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Supreme Court, U.S.
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No. 00-796

In The

Supreme Court of the United States

THE BOON INSURANCE AGENCY,
On Behalf of Itself
and All Others Similarly Situated,

Petitioner,

vs.

AMERICAN AIRLINES, INC., CONTINENTAL AIRLINES, INC., DELTA AIRLINES, INC. AND AMERICA WEST AIRLINES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals, Third District

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Airline Deregulation Act, 49 U.S.C. §§ 40101, *et seq.* (the "ADA"), preempts a claim in which a plaintiff sues an airline seeking not to enforce the airline's self-imposed undertakings under a contract, but instead seeking to recover the agreed-upon price plaintiff paid to the airline pursuant to the contract, based upon the contention that the price is too high and constitutes an unenforceable penalty under state contract law.

PARTIES

America West Airlines, Inc. is a wholly owned subsidiary of America West Holdings Corporation. TPG Partners, L.P., a Delaware limited partnership, has beneficial ownership of more than 10% of America West Holdings Corporation's common stock.

American Airlines is wholly owned by AMR Corporation, a publicly traded company.

Continental Airlines, Inc. has no parent company and as of July 31, 2000, (the most recent date of AXA's Schedule 13G filing), AXA Financial, Inc. and its affiliates held more than 10% of the Company's voting securities. As of December 15, 2000, Northwest Airlines Corporation and its affiliates held more than 10% of the Company's voting securities. The Company and Northwest Airlines Corporation and certain of its affiliates have entered into an agreement pursuant to which the Company will repurchase the majority of the Company's voting securities held by Northwest and will reclassify the remaining voting securities held by Northwest, which will result in Northwest Airlines Corporation and its affiliates owning less than 5% of the outstanding common stock of the Company, but the transactions contemplated by that agreement have not yet closed.

Delta Air Lines, Inc. has no parent corporation or holding company. As of June 30, 2000, Primecap Management Co., 225 Southlake Avenue, Suite 400, Pasadena, California 91101-3005, owned 10% or more of the stock of Delta Air Lines, Inc.

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STATEMENT OF THE CASE

This is an appeal of a summary judgment in which the lower courts determined that Boon's claim was preempted by the ADA. For the purpose of summary judgment, Respondents (the "Airlines") stipulated to the facts in Boon's pleadings. The facts necessary to address the arguments in Boon's Petition are adequately presented in the Austin Court of Appeals' opinion. Pet. App. at 3-4.

Boon describes its claim as "a contract action brought against four airlines." Pet. at 3. Boon did not allege, however, that Respondents breached their contracts with Boon. Boon's "contract action" is based upon the premise that Boon breached its contracts with Respondents. Pet. at 5.

The ADA preemption clause, 49 U.S.C. § 41713(b)(1), provides in pertinent part:

> [A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

This Court defined the scope of ADA preemption in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

Wolens analyzed the "enact or enforce a law" language of the statute. *Morales* analyzed the "related to a price, route, or service" language of the statute.

Boon does not dispute that its claim is "related to a price, route, or service of an air carrier." Boon's only contention is that its "contract action" does not require

the enforcement of state laws or policies, and therefore is not preempted under *Wolens*. Pet. at 10.

ARGUMENT

A. This Court Has Already Denied Two Petitions for Writ of Certiorari Raising the Issues Contained in Boon's Petition.

Boon fails to point out that this Court has already denied two petitions for writ of certiorari raising the issues contained in Boon's Petition. In *Leonard v. Northwest Airlines, Inc.*, 605 N.W.2d 425 (Minn. Ct. App.), *cert. denied*, 121 S. Ct. 183 (2000), counsel representing Boon filed a nationwide class action against Northwest Airlines in a Minnesota state court raising the same claims asserted in this case. The trial court dismissed the claims as preempted by the ADA. The Minnesota Court of Appeals affirmed.

Leonard filed a Petition for Writ of Certiorari with this Court on July 17, 2000 in Cause No. 00-109. This Court denied Leonard's Petition on October 2, 2000, approximately seven weeks before Boon's Petition was filed.

Boon's Petition is virtually identical to Leonard's Petition. The "Question Presented" is the same in both documents, as are the argument headings and even the footnotes. It appears that Leonard's Petition was simply reprinted, with "Boon" substituted for "Leonard" and "Texas" substituted for "Minnesota", and refiled with this Court. There are no arguments in Boon's Petition that

were not raised in Leonard's Petition. Nothing has changed in the intervening two months and this Court should therefore deny Boon's Petition for the same reasons it denied Leonard's Petition.

Boon also fails to mention *Blackner v. Continental Airlines, Inc.*, 709 A.2d 258, 260 (N.J. Super. Ct. App. Div. 1998), *cert. denied*, 525 U.S. 1142 (1999) in its Petition. *Blackner* was a putative class action in which Blackner alleged that a fee imposed by Continental for reissuing a lost ticket constituted an unlawful penalty. Blackner, like Boon, asserted a breach of contract claim that she argued fell within the *Wolens* breach of contract exception to ADA preemption.

The Superior Court of New Jersey held that the ADA preempted Blackner's claim because Blackner did not seek enforcement of a contract:

> Plaintiff does not seek enforcement of any contract she had with Continental. Quite the contrary, the contract that exists between plaintiff and the airline clearly authorizes the surcharge of which plaintiff complains. What plaintiff seeks is not to enforce the contract but to overturn it through a declaration invalidating the $60 surcharge provision.

Blackner, 709 A.2d at 260.

This Court denied Blackner's Petition on February 22, 1999. Boon's "contract action" is virtually identical to the claim asserted in *Blackner*.

Boon's Petition does not raise any new issues that were not already presented to this Court for review in

Leonard and *Blackner*. Boon's Petition should therefore be denied.

B. This Area of Law is Not Unsettled.

Boon contends this Court should grant its Petition to further refine "an unsettled area of law." Pet. at 14. Every court which has examined this issue, however, has found ADA preemption. *See Blackner; Leonard; Howell v. Alaska Airlines, Inc.*, 99 Wash. App. 646, 994 P.2d 901 (2000) (Plaintiff's claim that airline's policy of not refunding nonrefundable tickets was unconscionable and constituted unjust enrichment held to be preempted by ADA). There is no division among the lower courts on the question presented in the Petition for this Court to resolve.

In addition, the question presented in the Petition does not raise a matter of national importance. The ADA has been in existence for 22 years and all courts have agreed on the scope of ADA preemption as it pertains to the type of claim raised in this case.

C. The Austin Court of Appeals' Decision is Consistent with *Wolens*.

This Court held in *Wolens* that the ADA does not preempt a breach of contract claim "seeking recovery solely for the airline's breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. This Court also held that when a party alleges that the airline has breached a contract, a court deciding this claim is confined "to the parties' bargain, with no enlargement or

enhancement based on state laws or policies external to the agreement." *Id.* at 232-233.

The Austin Court of Appeals recognized that Boon did not meet the first, basic requirement to fit within the *Wolens* breach of contract exception to ADA preemption; it did not allege a breach of contract claim under Texas state law. The court held:

> Boon's assertion of its claim as one of breach of contract is an attempt to avoid the preemption clause and defeat the Act's intent. Boon does not seek the benefit of its bargain, which calls for a reissue fee, but rather seeks to invalidate its bargain by having this Court declare that the reissue fee is a penalty clause. The Act prevents us from doing so.

Pet. App. at 12.

The Austin Court of Appeals made the common sense determination that before a party can fit within the *Wolens* breach of contract exception to ADA preemption, the party must actually assert a breach of contract claim. This holding does not conflict with *Wolens*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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